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QUESTION PRESENTED

Was there a denial of due process of law under the Constitution of the United States when evidence of prior injuries to the victim were admitted without evidence linking Respondent to the prior injuries and the jury was instructed to use that evidence to convict him?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1074

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

MARK OWEN MCGUIRE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This is a simple case. A murder case. The McGuires brought their lifeless baby to Kaiser Hospital in Hayward at 9:00 p.m. on July 7, 1981. The doctors called the police because, based on the presenting injuries, the admitting physician, Dr. Levine, determined that this was a battered child case.

The police knew that they had a dead baby and only two suspects, the mother and the father. The police lied to the McGuires, and had the hospital lie to the McGuires about the baby's condition, leading the McGuires to believe that their child was still alive. Daisy and Mark McGuire were taken to the police station and questioned at length by a homicide detective, Robert Gillis. Nevertheless, the police took the position that they did not

"know" it was a homicide, because the autopsy had not yet been performed.

At the end of each interview the police told Mark and Daisy that their child, Tori, was dead. Each parent, listed as a suspect in the consent, consented to search of their home and to additional interviews, still without the benefit of an admonition of rights. The statement relied upon so heavily by the prosecution, that McGuire said "maybe, some Mexicans came in," was never revealed to the McGuires or their attorney until Police Officer Lapic was on the stand. That statement was obtained during the purportedly consensual search, prior to the taking of the scrupulously edited post-admonition version.

The autopsy confirmed the emergency room findings. The injuries are catalogued in detail. Although the dissent of The Honorable Alex Kozinski to the Order denying rehearing (the "Dissent") states that the baby "most likely died within minutes of having been beaten" (JA 132), Dr. Levine opined that, based on their color, the bruises were "at least" one hour old (RT 96). It is undisputed that the baby was beaten to death. Additionally, post-autopsy x-rays showed rib fractures, unseen by either the coroner, Dr. Hermann, or the admitting physician, Dr. Levine. The rib fractures were not used to diagnose Battered Child Syndrome ("BCS") (RT 136, 171, 172). In her motion *in limine* to exclude reference to prior injuries, defense counsel directed the courts' attention to the fact that the rib fractures were unknown at the time of the diagnosis of BCS.

Dr. Levine stated that the BCS could be proven by the nature of the injuries at the time of death (RT 94). Dr. Levine referred to the evidence of prior rib injuries as "confirmation" of that diagnosis (RT 92). All three doctors testified that there was no way the baby could have accidentally received the injuries resulting in her death. Analogies were made. She could not have hurt

herself, even wielding baseball bat (RT 131). She could not have received the injuries in a fall from 16 inches or 16 feet, according to Dr. Hermann (RT 141). No defense experts or other testimony contradicted the medical testimony. No other explanations were offered by the defense.

The briefs and the Dissent argue that McGuire raised the defense of accident and that the Ninth Circuit Panel misunderstood the issue of intent. (SG-24, PB-29, n. 12, JA 124, n. 4)[1] The panel makes no reference to intent. Intent to kill is always at issue in a murder case. The question is whether the jury can be instructed to connect intent and identity to prior injuries without linking the prior injuries to McGuire. The trial court deleted reference to intent and identity in the errant instruction, but permitted the connection to be made by the jury. Trial counsel strenuously argued against the jury instruction permitting use of the prior "offenses" to establish intent (RT 562). Use of the prior injuries to establish intent or identity, without linking those injuries to McGuire, is improper and extraordinarily prejudicial.

McGuire's statement to police was introduced to enable the prosecutor to impeach McGuire's own statements within it, where he said he was non-violent. Counsel for defendant strenuously objected (RT 227-239, 272-285). The court ruled that certain matters were "admissions of facts" (RT 284), and the "admission" was then used to permit introduction of credibility evidence. Though McGuire objected that admission of facts with no reference to penal interest was not a proper hearsay exception, the court stated that the Court of Appeal could correct the error (RT 285).

Even though McGuire admitted slapping Daisy in his statement, the prosecutor used character evidence to im-

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[1] SG refers to the Solicitor General's amicus brief, PB refers to Petitioner's Brief, JA refers to the joint appendix, CJLF refers to the amicus brief from the Criminal Justice Legal Foundation.

peach McGuire's statement in the purportedly consensual interview that he was not a violent person. The sole purpose of using the rank hearsay statement to the police was to create a character issue. The prosecutor argued that the modality of violence identified McGuire as the killer (JA 26).

As a result, McGuire was on trial for his propensity for violence, rather than for whether he committed the murder of his baby. The prosecutor insisted that character evidence was proper, arguing that, "His violent propensity with respect to the family setting within which this crime occurred are germane to show he and not Daisy is the aggressor" (RT 237).

Once McGuire's "non-violent" statement was admitted, the prosecutor brought witnesses to bolster the violent propensity theory. The prosecutor then stated that the statement was not admitted to prove his violence, but to "prove him a liar ultimately" (RT 240).

The first character witness called by the prosecution was Daisy McGuire, who testified under a grant of transactional immunity. This immunity was granted at the preliminary hearing. When she and Mark were questioned by the police after bringing Tori to the hospital, Daisy denied having hit Tori. She was not under oath and did not know Tori was dead. In fact, the police had told her Tori was alive. When she appeared at the preliminary hearing, she refused to testify on the grounds of self-incrimination under the Fifth Amendment of the United States Constitution. The prosecutor made no effort to determine what her testimony would have been before granting immunity, and never asked her at the preliminary hearing whether she hit Tori. Daisy McGuire surprised the prosecutor on the stand at trial and testified that she beat the baby. She said that she did not volunteer the information at the preliminary hearing because she was afraid of giving birth in jail (RT 386).

On the date of Tori's death, Daisy was only gone from the apartment for 5 to 10 minutes. This was confirmed, not only by Daisy but by a neighbor, Mr. Curtis Treadway (RT 543) and the landlady, Mrs. Cox (RT 557-8).

Daisy is characterized throughout the trial as passive (RT 213). Yet she herself testified that she took Mark's keys and threw them in the swimming pool causing him to lose his job (RT 441). Mr. Wood, a neighbor, witnessed and confirmed this altercation (RT 530).

Daisy testified that when she told the police she had not hit the baby, it was before she knew the baby was dead (RT 451, 428). She testified that she did not tell anyone that she hit the baby before because she was afraid (RT 429), she did not want to deliver her second baby in jail (RT 386) and she was not asked whether she had hit the baby at the preliminary hearing wherein she was granted transactional immunity (RT 428). She testified at trial that she had beaten the baby just prior to Mark's arrival at the house (RT 423, 425). She said that she was pregnant and vomiting, the child was sick and crying, the TV was broken, the weather was hot, she was angry at her husband. She hit the baby until the baby stopped crying (RT 422).

The rest of the prosecution witnesses, including Mrs. Short, were brought in to counter Daisy's exculpatory testimony by establishing McGuire's violent propensity.

Mrs. Short testified that she saw McGuire force feed Tori, and that afterward, she saw bruises on Tori's face and on another occasion she saw McGuire carry Tori by one arm for approximately 10-15 feet to his car. She then became confused, stating on re-cross that she had seen McGuire carry Tori to the car by one arm, but Daisy had told her McGuire pinched Tori's cheeks (RT 490). Those *acts*, carrying the baby by one arm and force-feeding her were the only acts regarding Tori that were.

in fact, tied to McGuire.[2] They were admitted for the purpose of impeaching Daisy. Mrs. Short witnessed violence against Daisy.

The trial court admitted McGuire's statement regarding his non-violence for the sole purpose of permitting the prosecutor to impeach it. The trial court admitted the child's prior injuries, including the rib fractures and lacerated anus, for the purpose of establishing the diagnosis of BCS. Evidence of McGuire's violence against Daisy was admitted to impeach her testimony that she was not afraid of him. Diane Short's testimony about rough treatment and Alan Lindner's testimony about early toilet training and swimming were admitted to rebut Daisy's testimony that it was in fact she who had beaten the child. When it came time to instruct the jury regarding the use of this evidence, the court permitted everything to be placed in one instruction, characterized as "other offenses."

The instruction stated:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is

[2] Force feeding and carrying the baby by one arm are characterized as "brutal" by the petitioner (Pet. 22, n.10). Without further engaging in the semantic battle, these acts are not murderous.

> accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose. (J.A. 40-41).

Intriguingly, petitioner argues that there is no likelihood that the jurors misunderstood the limitations of the evidence or misapplied it, even if it was imprecise or allowed improper inference to be drawn (PB 35). Intriguing, because in the long and winding history of this case's ascent to the United States Supreme Court, this is the first time petitioner has recognized that *all* the assaults and injuries were part and parcel of the instruction.[3]

Petitioner concedes that the California Court of Appeal did not even address the instruction issue[4] (PB 33). The federal district court held that the instruction was vague, and "the offenses" defined within it unclear, but that, in context, it "can only mean to refer the jury to the prior injuries to the baby, not to the slapping and rough handling incidents." The federal district court therefore, found no prejudice. (JA 62-63, note 1.) Since it is now conceded that the instruction referred to all the prior injuries and incidents of violence, the negative pregnant of the district court finding clearly indicates prejudice.

[3] Initially petitioner objected that the issue of wife beating and mistreatment of the baby other than prior injuries could not be raised. (Appellee's Ninth Circuit Brief page 8, note 2.) Even Petitioner could not see initially that all these matters were included in one jury instruction with directions to the jury to connect the character evidence to McGuire for a finding of guilt.

[4] Petition for rehearing to the California Court of Appeal was filed requesting the court to address the errant instruction.

The Ninth Circuit panel twice found error in the use of the prior injury evidence, coupled with the errant instruction. After the first opinion, petitioner requested rehearing on the grounds that the court *overlooked federal authority* recognizing the admissibility of the BCS (JA 90). The panel, one year later, wrote a new opinion, leaving out previous discussions regarding the grant of immunity to Daisy and discussing the distinction between *McGuire* and the federal authorities relied upon by petitioner (JA 113). Petitioner sought another rehearing, this time on the grounds that the there was now *too much reliance* on the previously ignored *federal authority* and that the federal court was acting as a super state Supreme Court (PR II, 9).[5] Rehearing *en banc* was denied, but Ninth Circuit Judges Kozinski and Trott, not on the hearing panel, dissented based on their perception that the federal court was unnecessarily inserting its opinion on state law evidentiary matters (JA 117).

This Court granted *certiorari* to review the question of whether the Ninth Circuit exceeded its *habeas corpus* jurisdiction by finding a federal due process violation arising from a state trial court evidentiary ruling which the state Appellate Court found to be correct as a matter of state law.

SUMMARY OF ARGUMENT

Mark McGuire was denied due process and a fundamentally fair trial when the prior injuries to the baby were introduced, over objection, for the purpose of proving BCS. The trial court was wrongly persuaded that the cases permitting prior injuries to prove BCS did not require any analysis for prejudice or admissibility. In fact, the California and federal cases have permitted introduction of BCS evidence of prior injuries *only* for limited purposes.

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[5] PR II refers to the second Petition for Rehearing, filed after the second opinion in May 1990.

The first purpose for introduction of prior injuries in BCS cases is when the charging statute permits or requires proof of a continuing course of conduct. An example of such a statute is the California child abuse statute. When it is indeterminable whether the cause of death or injury is the result of a human agency, expert testimony can tie the prior injuries to the present injury to rebut any defense of illness or accident. There was no question that the death herein was the result of human agency.

Other cases permit introduction of the prior injuries to address some other matter actually at issue such as murder by torture, neglect or long-term abuse and its consequences. None of those events were charged or alleged. It was error to prove the charge of murder on a time and date certain with prior injuries unrelated to the charge and unrelated to the defendant. The error was exacerbated by the instruction to the jury that it could tie the unproven prior injuries to other incidents of violence to make the connection to the murder charge at issue herein.

This was prejudicial error, depriving McGuire of a fair trial. It removed the crucial issues of intent and identity from jury consideration, and permitted the jury to connect other acts of misconduct to McGuire without proof.

The instruction at issue was a CALJIC instruction modified by the trial court on the use of similars. Similars *must* be tied to the defendant to be used for intent or identity. There was *nothing* linking Mark McGuire to the healing rib fractures or anal tearing which happened to the baby. He had worked full-time until the weeks just prior to the baby's death. His treatment of his wife, force-feeding the baby or carrying her by one arm are not similar enough either to the prior injuries or to the charged crime to permit such a connection for the purpose of establishing intent and identity.

Intent is always at issue in a murder case. Intent and identity are essential elements of the crime of murder. To permit the jury to establish such salient elements without tying the prior injuries to McGuire in any meaningful way denies fundamental fairness under any test, including the test proposed by petitioner.

Petitioner concedes that state prisoners are entitled to a fundamentally fair trial under the United States Constitution as applied to the states through the Fourteenth Amendment Due Process Clause.

Requiring due process of law is not a new rule. There is United States Supreme Court precedent requiring the states to follow their own procedural rules. State procedural rules must comply with the United States Constitution. Instructions to the jury to implement those rules must also comport with due process requirements.

Additionally, petitioner and its *amici* seem to suggest a rule of universal admissibility of prior injuries in battered child cases, regardless of the charged crime, the nature of the injuries, the connection with the defendant or the nature of the defense. The result of such a rule is anathema to their stated position—a universal rule of inclusion of evidence imposed upon the states by the United States Supreme Court.

A foreseeable consequence of such a rule could be a vehicular homicide case where a parent fails to strap a child into a car seat. Prior injuries to the child of an unknown source could be discovered and used to establish intent to kill by the driver. Such an absurd result must not be sanctioned by this Supreme Court.

The Fifth Amendment to the United States Constitution provides to all citizens the right to trial by jury. If the instructions given eliminate an essential element of proof from the jury's consideration, due process is denied. No deprivation of liberty may be sanctioned without due process of law.

The introduction of evidence of injuries of unknown origin, coupled with an instruction establishing the connection between the injuries and the murder, removed the burden from the prosecutor. He was no longer required to prove either intent or identity beyond reasonable doubt, and respondent was thereby deprived of due process of law.

The Ninth Circuit Court of Appeals correctly reversed the conviction. The decision reversing the denial of Petition for Writ of *Habeas Corpus* should be upheld.

Petitioner argues that the Ninth Circuit opinion converts fundamental fairness into a code of evidence for state criminal trials and requests that this Court define and limit the reach of federal *habeas corpus* review of state convictions. Petitioner suggests a test for determining when state law error has denied the defendant a fundamentally fair trial and due process, conceding that state prisoners are entitled to a fundamentally fair trial under the United States Constitution as applied to the states by the Fourteenth Amendment Due Process Clause. It is argued, though, that McGuire did receive a fair trial, and that the federal court misinterpreted and may not review the state law.

Both the SG and the CJLF Amicus Briefs have set forth their own questions presented. This Court stated in 1954 that "We disapprove the practice of smuggling additional questions into a case after we have granted certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954).

Amici Curiae are not entitled to present additional questions. *Supreme Court Practice*, Stern, Robert L.; Gressman, Eugene; Shapiro, Stephen M., 6th Ed. (1986), page 571.[6]

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[6] *See, Bell v. Wolfish*, 441 U.S. 520, 532, n.13 (1979) wherein Justice Rehnquist refused to address the question raised in an amicus brief by the NAACP Legal Defense Fund "because the

In an abundance of caution, the questions presented in the *amicus* briefs will be briefly addressed.

The Criminal Justice Legal Foundation narrows this entire dispute to a relevance question, then claims that any rule that permits a federal court to overturn a state question of admissibility of evidence on the grounds of relevance would be a new rule under *Teague v. Lane*, 489 U.S. 288 (1989) (CJLF 3).

The Solicitor General concentrates on whether the introduction of the medical evidence of prior injuries in a child abuse case violates due process in the absence of direct evidence that the defendant inflicted the prior injuries.

Biblical references notwithstanding (CJLF 21), there is Supreme Court precedent requiring states to follow their own procedural rules, and to implement those rules with instructions to the jury which comply with known procedural rules. These are not amorphous or general. Just because the Constitution does not mention the presumption of innocence or the requirement that guilt be proved beyond a reasonable doubt does not mean that a shifting burden is not Constitutional error. This is particularly true when the shifting burden is not the result of a legislative enactment but is based on trial court error in admission and instruction. A person may not be deprived of liberty without due process. An accused has the right to a trial by an impartial jury and to be informed of the nature and cause of the accusation. These Sixth Amendment rights underlie the fair trial guaranteed to state prisoners through the Fourteenth Amendment.

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argument was neither presented to or passed on by the lower courts; nor have they been urged by either party in this court. Accordingly, we have no occasion to reach them in this case." C.f., *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n. 2 (1981); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

There must be something to tie the prior injuries to the murder charge. The Ninth Circuit panel was correct in reversing this conviction. The errors made regarding admission of evidence and the instruction denied McGuire a fair trial.

ARGUMENT

I. THE NINTH CIRCUIT PANEL DID NOT EXCEED HABEAS JURISDICTION

A. The Federal Court Must Reverse The Conviction When Confinement Violates the Constitution Of The United States

Petitioner argues that the Ninth Circuit exceeded its jurisdiction by ordering the lower court to grant the Petition for Writ of Habeas Corpus in this action.

Petitioner's argument is based on a failure of logic. The argument is based on the premise that the federal court cannot overturn a state evidentiary ruling based on state law (PB 19). In fact, this Court can and must overturn a conviction based on admission of evidence and concomitant jury instruction which violates the Constitution of the United States (28 U.S.C. § 2254).

The Ninth Circuit said that without the injuries and the instruction, "only the barest threads connect McGuire to the crime" (JA 113).

The Dissent characterizes the evidence of guilt as overwhelming (JA 118). Without analysis of connection between McGuire and the injuries, the Dissent states, "A finding that evidence is inadmisisble to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts" (JA 127, fn. 5). As will be shown, however, prior acts are inadmissible without proof that McGuire is connected to the prior acts.

Much is made of the conversation overheard in the emergency room between the parents. With rampant

speculation, the Dissent contends that the emergency room conversation, wherein McGuire said in response to Daisy's questions that he "didn't know" what happened, and failed to respond when Daisy said, "you are responsible," made no sense unless McGuire abused the baby (JA 130).

"Biblical history of Pontius Pilate's condemnation of Jesus, as well as human experience, has taught us that silence or an equivocal reply in the face of an accusatory statement is not always indicative of a consciousness of guilt." *People v. Spencer*, 78 Cal.App.2d 652, 656 (1947); *People v. Simmons*, 28 Cal.2d 699, 713-714 (1946); Matt. Chap. 27, v. 11-14; 3 Wigmore on Evidence § 1072, pp. 84-85.

The Dissent speculation is capped with the remarkable conclusion that this double hearsay interpretation could be exceeded in reliability only by a "videotape of the crime" (JA 130).

In a state action, when inadmissible evidence is accompanied by a constitutionally erroneous, burden-shifting instruction, *habeas corpus* is proper. *Yates v. Evatt*, —— U.S. ——, 91 Daily Journal D.A.R. 6160, 6161-6162 (May 29, 1991). In *Yates*, this court twice ordered the South Carolina Supreme Court to release the petitioner. On the first remand, the state court ignored this court's mandate; on the second, it found harmless error. Such an error, being of constitutional magnitude, is not harmless. *Yates* was not a retroactive application of a new rule of law, no longer cognizable on habeas under *Teague v. Lane*, *supra*; *Sawyer v. Smith*, —— U.S. ——, 110 S.Ct. 2822, 2823 (1991).

The errors in *McGuire* are constitutionally similar to those in *Yates*, and have long been recognized as unconstitutional.

The evidence of prior injuries to Tori McGuire was initially admitted for the limited purpose of establishing BCS, that is, to show that the injuries were not accidentally inflicted (JA 519).

The prosecutor, when asking for admission of injuries and testimony regarding BCS stated, "We do not maintain that the BCS addresses itself to the identity of the perpetrator. We maintain it as a diagnostic devi[c]e period" (JA 16).

Defense counsel argued that the prior injuries should not be admitted under Cal. Evid. Code § 1101(b), the equivalent of Fed. Rules of Evid. 404(b), which forbids character evidence, or Cal. Evid. Code § 352(a), which forbids evidence which is more prejudicial than probative (JA 18). The trial court herein failed to weigh the evidence under any standard before admitting it.

When the time came to formulate the instruction limiting the use of "similars" evidence, CALJIC 2.50, the prosecutor argued that Cal. Evid. Code § 1101(b) had no application, because this is a battered child case (JA 34). Contrary to his earlier statement that the BCS was merely a diagnostic device, not for identification, he now maintained that the injuries "were to infer and connect" McGuire to the homicide (JA 34). When McGuire argued that it was necessary to connect McGuire to the prior offenses in order to use them against him, the prosecutor argued that, "Some facts do double duty, obviously" (JA 37). In other words, there was no need to prove that McGuire committed the prior injuries in order to use them to connect him to the murder by way of identity and implied intent.

The Court lumped all prior injuries together. The rib fractures and anal tearing were referred to as "prior injuries" together with the one-arm carrying and force-feeding. Defense counsel argued,

> First of all, we discussed in chambers . . . that all, just grouping all prior injuries, I certainly understand that to come in for . . . limited purposes. . . . So, the fact that I didn't object when he asked something about the bruises should not allow him to get

> that in for some other purposes. They came in for those two limited purposes (JA 29).

The trial court clarified that the two limited purposes were impeachment and to establish battered child syndrome (JA 30). The prosecutor argued, "If it is admissible, it is admissible" (JA 29).

The trial court initially admitted the evidence for limited purpose, conceded to by the prosecutor, but then permitted the jury to use the prior injuries to identify McGuire as the perpetrator of all the injuries and connect him to those injuries where *no* evidence was established about time, place or manner. There was *no* evidence that McGuire was present at the time the prior injuries were inflicted, or even that he had access to the child during the time-frame. No specific evidence was introduced about the time frame of the infliction of the prior injuries occurred. (Compare, *United States v. Boise*, 916 Fed.2d 497, 501 (9th Cir. 1990).)

The recently established standard requires that this Court review the jury instructions to determine the "reasonable probability" that the verdict rested on an unconstitutional ground. *Boyde v. California*, —— U.S. ——, 110 S.Ct. 1190, 1198 (1990).

It is an essential corollary of our reasonable doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict *could* have rested on unconstitutional grounds. *Stromberg v. California*, 283 U.S. 359, 367-368 (1931). "A conviction ought not rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). Of course, this instruction was *not* an equivocal direction. It was an unequivocally wrong statement of the law. The evidence was improperly admitted, without analysis, initially for limited purpose. The Court then gave a "limiting" instruction telling the jury that it could connect prior injuries with prior witnessed acts of

violence against both McGuire's wife and against his baby in order to find him guilty of murder.

"[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 552, 563-564 (1967). Use of prior offenses in a state case does not by itself violate due process.

> The defendants' interests are protected by limiting instructions . . . and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.

Spencer v. Texas, 385 U.S., at 561.

When, as here, no limiting instruction confining the evidence to its proper function was given, introduction of prior crimes evidence is violative of the Due Process Clause. The rule which forbids the introduction of evidence of other offenses is not a mere technical rule of law. "It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence." *Spencer v. Texas, supra*, 385 U.S., at 574, fn. 5 (Warren, C.J. and Fortas, J., concurring).

Chief Justice Warren went on to state,

> Recognition of the prejudicial effect of prior conviction evidence has traditionally been related to the requirement that the state prove beyond a reasonable doubt the commission of a specific criminal act.

Spencer v. Texas, supra, 385 U.S., at 575.

Clearly, the limiting instructions were considered to be the saving grace of the use of prior convictions under the Texas statute. Notably, the procedure employed at the trial herein, where evidence was admitted for a limited purpose and the jury was instructed to connect the prior offenses to the offense charged, was not a California procedure authorized by statute.

The instructions herein were so confusing that even the courts and attorneys who have considered them have not been clear what they related to. The California Court of Appeal refused to address them at all. The Federal District Court thought they related only to the prior injuries to the baby, not to the slapping and rough handling incidents (JA 62-63, fn. 1). Although Petitioner now concedes that the instruction referred to all the prior incidents of violence, it has taken many years of briefing to reach that point. How the jury could be expected to understand an instruction so confusing that experienced attorneys and courts could not understand it is incomprehensible.

The principles of presumption of innocence and proof beyond a reasonable doubt, as well as rules against the use of unrestricted propensity evidence, are deeply rooted in American jurisprudence. "Due process prevents state action which offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Screws v. United States*, 325 U.S. 91, 95 (1945). In *Screws*, the court found dual error, including instructional error, albeit in a federal case, on its own motion. 325 U.S. 107. While the Constitution of the United States does not specifically state the presumption of innocence, it is undeniably a foundation of U.S. criminal law. *In re Winship*, 397 U.S. 358, 364 (1970). Any suggestion that federal courts cannot correct deprivation of a fair trial by a state committing evidentiary error and permitting burden-shifting jury instructions because there is no link to a particularly delineated specific guaranty of the Bill of Rights is therefore in error (SG 12, CJLF 19).

Justice Oliver Wendell Holmes characterized the right of state prisoners to apply to federal courts for constitutional protection as perhaps the most important guaranty of the Federal Constitution.

> When the decision of the question of fact is so interwoven with the question of constitutional right that the one necessarily involves the other, the federal court must examine the facts.

Frank v. Mangum, 237 U.S. 309, 347 (1914) (Holmes, J. Dissenting).

The Solicitor General argues that the plea of not guilty required the government to disprove any accident defense, whether or not actually presented, by means of prior injuries and direction to the jury to connect them to McGuire without any evidence (SG 24).

While urging the court to look at the whole trial, it is suggested that the jury instruction should be "viewed without distortion . . . of the admissibility of the evidence in question" (SG 25). This really cannot be done. Disconnecting character evidence from the court's instruction on how to use it violates due process. See, *Spencer v. Texas, supra*, 385 U.S., at 561.

Petitioner argues that the opinion of the Ninth Circuit demonstrates a fundamental misunderstanding of the limits which this Court has placed on federal *habeas corpus* jurisdiction (PB 19). This is not true. Understanding its limits, the Court found a due process violation, and reversed the conviction based on violations of the United States Constitution. The fact that a trial court errs and the state appellate court fails to consider the error must *not* prevent federal courts from determining Constitutional violations.

B. Principles of Comity Are Protected

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* charged. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (emphasis in original). The offense charged herein was murder on July 7, 1981. It was not neglect or long-term abuse jus-

tifying reference to prior injuries. It was not based upon an accident defense, where the actus reus is admitted, but the intent to kill is denied. See, E. Imwinkelreid, *Uncharged Misconduct Evidence*, Chapter 4 (1984).[7]

Petitioner and *amici* argue that the evidence was admitted under state law and reviewed by a state court, and that the federal courts may not simply review rules of state evidence. This does not mean federal courts may not review state decisions. The Due Process Clause requires evaluation based on disinterested inquiry. Forcible extraction of stomach contents by the government, for example, is "too close to the rack and the screw" to permit constitutional differentiation. *Rochin v. California*, 342 U.S. 165, 172 (1945). The federal courts and the federal constitution must be available for review of state criminal convictions. The fact is that the state appellate court herein failed and refused to review the erroneous jury instruction which made the wrongful admission of evidence even more harmful and prejudicial. If the state court fails to follow its own rules of due process and precedent by permitting unproven prior acts to be considered "similars" for the purpose of instructing the jury, it offends fundamental principles of justice. *Speiser v. Randall*, 357 U.S. 513, 523-524 (1958).

It should be noted that the position taken by petitioner's *amici* is certainly not a new position. In dissenting against *Griffin v. California*, wherein this Court held that California's rule permitting comment to the jury on a defendant's Fifth Amendment refusal to testify was unconstitutional, Justices Stewart and White stated that the Fourteenth Amendment did not "of its own force forbid . . . comment on a defendant's failure to testify." *Griffin v.*

[7] Though both amicus briefs cite Imwinkelreid as authority on prior misconduct evidence, both ignore Chapter 4 which specifically addresses Battered Child Syndrome and specifically discusses the necessity for similarity between the prior acts and the charged crime.

California, 380 U.S. 608, 619 (1965). There has been no suggestion by this court that it will not apply the guarantees of the Bill of Rights to the citizens of the states. This court has expressed a preference for protection of victims of child abuse. The protection of that public policy interest must be balanced against evidentiary limitations that will encourage accurate finding of facts upon which a citizen's incarceration are based. *Maryland v. Craig*, —— U.S. —— 110 S.Ct. 3157, 3165 (1990).

The prosecutor's actions against McGuire were inimical to accurate fact finding. No facts whatsoever were presented regarding the prior injuries to the baby. "[S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Dowling v. United States*, —— U.S. ——, 110 S.Ct. 668, 671 (1990).

In *Dowling*, this court held that the facts underlying a prior acquittal could be used in a subsequent robbery trial. In *McGuire*, there are *no facts* connecting the prior injuries to McGuire. The injuries were introduced initially only for the purpose of confirming the BCS. As a result, McGuire had no opportunity to "litigate" the facts of the prior injuries before they were used, by means of the jury instruction, to shift the burden of proof from the prosecution. The introduction of such evidence under these circumstances is so unfair that it violates "fundamental conceptions of justice." *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983). The adoption of a state rule cannot foreclose inquiry as to whether the application of the rule results in deprivation of due process. *Lisenba v. California*, 314 U.S. 219 (1941).

Prior bad acts may not be used to prove intent unless the commission of the acts by the defendant himself is proven beyond a reasonable doubt. *United States v. Hadley*, 918 F.2d 848, 850 (9th Cir. 1990). This is a mixed question of law and fact because there is no question of the fact of the prior injuries. The factual question is how they occurred, and the legal question is whether the fact of their occurrence can be used against McGuire. There is no presumption of correctness of the factual and legal question presented, because no analysis was made by the trial court of either the factual or the legal basis for admission of the prior injuries against McGuire. *Sumner v. Mata*, 455 U.S. 591, 597 (1982); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

This is not a case where the federal court is "peering majestically over the state court's shoulder." *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 3102 (1990). The presumption of correctness of a state court hearing does not apply if the *habeas* petitioner demonstrates that the fact finding procedure was not adequate to afford a full and fair hearing, or if the material facts were not adequately developed at the state court hearing. 28 U.S.C. §§ 2254(d)(2) and (d)(3).[8]

Justice Frankfurter stated that "the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule . . . a gradual process of judicial inclusion and exclusion." *Irvine v. California*, 347 U.S. 128, 143 (1954) (Frankfurter, J., dissenting).

The argument is made that state courts need protection from federal intrusion, that state courts are just as able

[8] Even under the proposed changes presently before the Subcommittee on Civil and Constitutional Rights Committee and the Judiciary, U.S. House of Representatives known as the President's Crime Bill, the stated purpose of which is to curb the abuse of habeas corpus by state and federal prisoners, this presumption of correctness requires full and fair determination of the facts and full and fair adjudication of the claim before the state court. Crime Bill § 205, § 2254 amendments.

to resolve questions of Constitutional magnitude as federal courts. This is true. It is also true that *habeas* review by federal courts permits dialogue between the courts and, according to Justice Harlan, forces both the federal and state courts to toe the constitutional mark. Patchel, K., *The New Habeas*, 42 Hastings Law Journal 939, 1028; *Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., concurring).

The facts underlying the prior injuries were not established at all against McGuire. The injuries were admitted, over objection, for the ostensible purpose of overcoming an accident defense. The jury was instructed that even without evidence tying McGuire to the prior injuries, it could use those injuries to infer *his* intent to kill and connect him to the crime by means of other propensity evidence.

This was not due process of law. This was not a fair trial. The state appellate court did not even consider the effect of the instruction on the admission of this evidence. Protection of state prisoners from constitutional error of this magnitude is not a new rule. *Teague v. Lane*, 489 U.S. 288 (1989).

II. STATE AND FEDERAL BATTERED CHILD CASES CASES DO NOT MANDATE ADMISSION OF PRIOR INJURIES WITHOUT ANALYSIS

Ironically, the rule proposed by petitioner and the *amicus curiae* would result in a Supreme Court mandated rule of admissibility of evidence. That is why the question presented by respondent is framed in terms of due process. That is not a question of admissibility of evidence. It is a question of constitutional magnitude when evidence is incorrectly admitted for one purpose, the BCS, and the jury is instructed to use the evidence to establish McGuire as the killer. The BCS is admissible in state and federal courts; however, the trial court must analyze the evidence to be introduced to prove the BCS

in order to determine whether the evidence of prior injuries to the baby can be tied to some issue in the case.

A. Case Survey—California

The BCS diagnnosis was initially approved under the *Frye* test of admissibility in California by the Court of Appeal in *People v. Jackson*, 18 Cal.App.3d 504 (1971). The court in *People v. Jackson* admitted evidence of a series of injuries to a child against parents charged under the child abuse statute, Cal. Pen. Code § 273a. It was all of the injuries which resulted in the diagnosis of the BCS. The parents presented a defense of denial and an opposing medical expert. The distinguishing fact regarding *People v. Jackson* is that the court held that prior injuries, and all of them, were necessary to prove the charge of child abuse. On the contrary, the medical experts testifying against McGuire did not need the prior injuries to prove that this child was battered.

The BCS was then approved by the California Supreme Court as a medical diagnosis. *Landeros v. Flood*, 17 Cal.3d 399 (1976). The California Supreme Court recognized in this civil medical malpractice case that the BCS was an accepted medical diagnosis and cited authority from other jurisdictions; *People v. Henson*, 33 N.Y.2d 63 (1973); *State v. Loss*, 295 Minn. 271 (1973).

The leading article relied on by the trial court in this case and in most other battered child cases is the article by Kempe, et al. 181 AMAJ 17, 18, which states that "to the informed physician, the bones tell a story the child is too young or too frightened to tell." Today legislative protections have been enacted which require not only doctors but child care workers and teachers to report suspected child abuse. *Cf.* Cal. Pen. Code § 11164, *et seq.* It is undisputed that the BCS is an admissible medical diagnosis. Nonetheless, the evidence used to prove the BCS must be analyzed to determine its admissibility, particularly if it will be doing "double duty" by not

merely overcoming an accident defense, but being used as a "similar other offense" for the purpose of establishing guilt. While the facts and statistics verify the ugliness of child abuse, there is no precedent for a separate rule of admissibility for child abuse cases that is contrary to the rules that apply to other murder cases.

In *People v. Steger*, the California Supreme Court reduced a sentence from first to second degree murder. BCS evidence had been introduced not simply to overcome an accident defense, a proper purpose, but to support a finding of murder by torture under Cal. Pen. Code § 189. *People v. Steger*, 16 Cal.3d 539, 546 (1976). Unlike in *McGuire*, the prior injuries in *Steger* were tied to a matter actually placed at issue by the defendant. The injuries were connected to the stepmother defendant by her confession, were to rebut an accident defense, and to prove murder by torture.

In *People v. Wright*, the California Court of Appeal ruled that the trial court properly admitted evidence of a pattern of child abuse to substantiate Pen. Code § 273a as an underlying crime for felony murder and to rebut the defense of accident presented by both parents in testimony on the stand. *People v. Wright*, 60 Cal.App.3d 6, 13 (1976).

In *Wright* the child's death occurred from peritonitis resulting from bowel rupture caused by continued beatings. The prior injuries were a direct cause of death. *People v. Wright, supra*, 60 Cal.App.3d, at 9.

The issue in this murder case was whether McGuire beat Tori on July 7, 1981, causing her death. In each of the cases cited to the trial court as authority for permitting admission of BCS, as well as in their progeny, BCS was essential to the charge. The continuing course of conduct was part and parcel of the death. In *People v. Ewing*, the court permitted evidence of a continuous course of conduct to prove a violation of Pen. Code § 273a.

The information alleged violation of Pen. Code § 273a by a course of conduct which occurred during a designated six month period. As such, the prior injuries were necessary to prove the charge. The jury was unable to substantiate murder. *People v. Ewing*, 72 Cal.App.3d 714, 717 (1977).

Felony murder was not instructed in *McGuire* because the court found child abuse was an integral part of the homicide, and could not therefore be the subject of a separate offense under *People v. Ireland*, 70 Cal.2d 522, 539 (1970). Pen. Code § 273a (child abuse) was neither charged nor instructed.

In *People v. Shockley*, the defendant mother was charged with two counts of willful cruelty, child endangerment, cruel and inhuman corporal punishment and second degree murder. She had three children, twins and an older child; one of the twins was dead, the other severely malnourished. The cause of death was malnutrition and dehydration. The defendant's course of conduct and the children's prior injuries were essential to prove the charge. *People v. Shockley*, 79 Cal.App.3d 669, 674 (1978).

In *People v. Aeschlimann*, the parents of an abused child were convicted of first degree murder. Neighbors witnessed and testified to the infliction of prior injuries. Further, the court ruled that the testimonial evidence of previous beatings was "not evidence of 'prior acts' within the meaning of Evid. Code § 1101, but was instead evidence of the crime with which defendants were charged: a course of conduct of inflicting grievous pain and suffering that proximately caused Todd's death [murder by torture]." *People v. Aeschlimann*, 28 Cal.App.3d 460, 473 (1972).

In *People v. Atkins*, 53 Cal.App.3d 348, 353 (1975), there were admissions and other testimony linking the prior injuries to the child. The prior injuries, seen by

others, included burns, bites and broken bones. The baby died of peritonitis, and both adults were charged. The man was convicted of second degree murder and the mother of involuntary manslaughter. Once again, the prior injuries were shown to be part and parcel of the death.

On May 3, 1991, a California appellate court disallowed evidence of prenatal drug use in a Pen. Code § 273a fatal child endangerment case because there was no connection between the prenatal drug use and the death. The court detailed the careful scrutiny which must precede evidence of other crimes under California law, which rule was in effect at the time of McGuire's trial.

> It is well settled that "admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, fn. omitted.) Such evidence must be scrutinized carefully. Its admission depends on . . 1) the materiality of fact sought to be proved or disproved, 2) the tendency of the uncharged crime to prove or disprove the material fact, and 3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*Id.*, at p. 315 and fn. 14.)

People v. Moten, 91 Daily Journal, D.A.R. 5272, 5274 (May 3, 1991).

Furthermore, if the probative value is slight and the potential for prejudice great, the evidence should be excluded under Evid. Code § 352. *People v. Turner*, 50 Cal.3d 668, 703-705 (1990).

In conclusion, the California BCS cases do *not* justify admission of the other crimes evidence against McGuire. The injuries were not tied to a material issue and were not analyzed by the trial court for their admissibility. Prior injuries to the baby which took place at an unknown time in an unknown place and were inflicted by

an unknown party cannot be tied to the defendant by means of a complex and erroneous jury instruction without creating prejudicial error, and consequently denying McGuire of his right to due process of law.

B. Case Survey—Federal

The mother in *United States v. Woods* was found guilty of first degree murder in the death of her foster son, Paul. 484 F.2d 127, 129 (4th Cir. 1973). Paul was cyanotic, turning blue and gasping for air on three occasions, and ultimately leading to his death. Mrs. Woods was the only person who had access to the child. The action was tried in federal court because Mr. and Mrs. Woods lived on an army base. The government showed that between 1945 and the date of trial, seven children, including the Woods' three natural children, had died and two others in her care had experienced cyanotic episodes.

The Court held that the evidence of injuries to other children was admissible to prove *corpus delicti*—death by foul means. *United States v. Woods*, 484 F.2d at 132. The remarkable similarity of the deaths and surrounding circumstances among these children, all of whom came in contact with Mrs. Woods, was relevant not as to the propensity of Mrs. Woods to commit other crimes but to show that the unique methods were like a "signature." *Woods*, *supra*, at 133. The court in *Woods* confirmed that use of prior injuries to overcome an accident defense may be "invoked only where an accused admits that he did the acts charged but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally. *McCormick*, p. 450." *Woods*, *supra*, at 134.

In another action, the jury had to decide whether an infant died of abuse, accident or birth trauma. *United States v. Leight*, 818 F.2d 1297, 1299 (7th Cir. 1987). The Court of Appeals ruled that the evidence of child abuse against Mrs. Leight's other children must be

weighed to determine whether 1) the evidence fits within an Evid. Code § 404(b) exception; 2) the probative value outweighs prejudicial effect; and 3) the prior misconduct was proved by clear and convincing evidence. *United States v. Leight*, *supra*, at 1302. The district court carefully weighed the evidence and admitted it to overcome a defense of accident presented by Mrs. Leight. *Id.*, fn. 3.

In *United States v. Harris*, the defendant testified at trial that he never hit the baby, that when he had the baby on his shoulders, he tripped and fell. 661 F.2d 138, 140 (10th Cir. 1981). Other injuries were introduced to rebut the defense of accident. The court followed the rule stated in *United States v. Colvin*, 614 F.2d 44 (5th Cir. 1980) that the prior injuries were admissible because the government had offered "sufficient proof linking the appellant to the prior injuries to meet the threshold test" for admission; and that the pattern of abuse was relevant to overcome an accident defense and to establish intent.

When there is a total failure of showing that the prior injuries were caused by the defendant, the evidence of prior injuries is inadmissible. *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979). In *McGuire*, the trial court totally failed to determine a connection, apparently believing it unnecessary to show a connection between McGuire and the child's prior injuries.

The Solicitor General asks this Court to decide whether the introduction of medical evidence of prior injuries violates due process if there is no direct evidence tying the injuries to the defendant.

This requires, of course, *some* indication that the prior injuries were caused by the defendant. The BCS cases cited to this Court do not permit automatic admission of prior injury evidence. Where, as here, the severity of the beating which caused the death is sufficient in itself to prove that Tori was a battered child, evidence of prior injuries, without a tie to the defendant, are cumulative on the issue of BCS.

Petitioner and *amici* supporting its position argue that because the prosecution has the burden of proof on all issues, a defendant cannot remove an issue from dispute either by stipulation or passivity. (CJLF 5, SG 16, Pet. 30.) It is further argued that the prior injuries are relevant to show intent and identity, and lack of accident, whether or not an accident defense is introduced. Analogies are drawn, for example, to arson (SG 14) and distinguishing bank robbery (SG 18) using the "anonymous intent" argument set forth in Imwinkelreid, § 2.05 to justify use of the prior injury evidence. The source for the arson analogy happens to be a California case. "The other fires are admissible to prove the actus reus of arson even if the proponent of the evidence cannot link the defendant to the other fires." (Imwinkelreid, *Op. Cit.*, § 2:05, Chap. 2, p. 8, fn. 30.)

In that case, a man was charged with burning down the family business. He had twice previously collected insurance payments on arson fires. These other fires, albeit uncharged, were admitted for the purpose of establishing *modus operandi*, a recognized exception to the rule barring character evidence. *People v. Maler*, 23 Cal.App. 3d 973, 977 (1972).

When one crime is charged, it is not relevant that other, similar crimes have taken place unless it can be proven that the act occurred and that defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). The independent relevance cannot be bootstrapped as it was in this case. Here, the prior injuries were admitted initially for the purpose of establishing the BCS; the prosecutor thereafter introduced McGuire's statement, wherein he admitted slapping wife and denied he was a violent person. The prosecutor then called Mrs. McGuire, who said, the first time she was asked under oath, that she beat the baby. Then the wife slapping, arm carrying and force-feeding testimony came in to negate Mrs. McGuire and his statement. The jury was in-

structed that the unspecified "other offenses" could be used to establish a "clear connection" so that if the jury thought that McGuire committed the "other offenses" it could "logically conclude" that "he also committed the the crime charged in this case." The prosecutor argued, when confronted with the problem that evidence was admitted for limited purpose, that "If it is admissible, it is admissible" (JA 29). This use of prior injuries ostensibly to prove BCS and then to bootstrap intent is an impermissible use under any authority, state or federal. The admission of this evidence coupled with the trial court's instruction, denied McGuire due process of law.

III. THE TRIAL COURT'S INSTRUCTION ON THE USE OF OTHER CRIMES EVIDENCE WHEN COMBINED WITH THE ADMISSION OF THE PREJUDICIAL EVIDENCE, VIOLATED MCGUIRE'S RIGHT TO DUE PROCESS

A. The Purported "Limiting Instruction" Actually Allowed Unlimited Use

The trial judge, over extensive defense objections, included a modified version of CALJIC No. 2.50 in his charge to the jury (JA 21-39).

CALJIC No. 2.50 was designed to limit the jury's use of evidence of other offenses. *People v. Rollo*, 20 Cal.3d 109, 122 (1977). However, the instruction read to the jury in this case did not limit the use of evidence of other offenses, but instead urged the jury to maximize the use of this evidence in an extremely prejudicial manner. When combined with the evidence of anal tearing, prior rib fractures, and other unidentified prior offenses deprived McGuire of his right to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment.

CALJIC No. 2.50 (1979 Revision) stated, in relevant part:

"Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which he is on trial.

"Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

"[A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [the identity of the person who committed the crime, if any, of which the defendant is accused] [a clear connection between the other offense and the one of which defendant is accused so that it may be logically concluded that if defendant committed the other offense[s] he also committed the crime charged in this case] [the corroboration of the testimony of the prosecuting witness];]

"[The existence of the intent which is a necessary element of the crime charged;]

"[The identity of the person who committed the crime, if any, of which the defendant is accused;]

. . . .

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose." (California Jury Instructions, Criminal, Fourth Edition, 1979, pp. 53-54.)

In order to qualify as a limiting instruction, CALJIC 2.50 must identify the evidence to which it relates. *People v. Rollo, supra*, at 123, fn. 6.

When the version of the CALJIC instruction in effect at the time of trial is compared to the version actually given by the trial judge, the omissions and misstatements are apparent.[9]

The first deviation from CALJIC No. 2.50 was the trial judge's statement, in the first sentence of his instruction, that evidence had been introduced to show that McGuire had committed acts similar to the crime for which he was on trial. This had the effect of removing a critical issue from the jury: whether any of the other offenses was, in fact, similar.

The trial judge exacerbated the problem by leaving out the first bracketed paragraph of CALJIC 2.50, which explains that the evidence, if believed, must be examined to determine if it shows a "characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case." It is *only* after this determination is made that a jury may reach the question of whether there is a clear enough connection between the offenses "that it may be logically concluded that if defendant committed the other offenses he also committed the crime charged. . . ." [10] The bracketing, which is included in the

[9] Amicus curiae, Criminal Justice Legal Foundation, contends that whether the trial judge misread the instruction is "immaterial" because CALJIC is only a recommendation of a committee of the Superior Court of one county (CJLF p. 11, fn.10). This contention unfairly minimizes the importance of standard jury instructions in California state trials and belies a fundamental misunderstanding of the wide use of CALJIC by judges and lawyers. Indeed, judges are specifically encouraged to rely upon CALJIC unless they find that other instructions better state the law. (See California Standards for Judicial Administration, section 5.)

[10] It is clear from the use note accompanying CALJIC No. 2.50 ["In using this instruction, if the first bracketed paragraph on

official version of CALJIC 2.50 is extremely confusing. There is no closing bracket to the first bracketed paragraph until the outside of the semicolon at the end of the paragraph. This indicates grammatically that the first sentence of the paragraph *must* be used if the "clear connection" language used in the *McGuire* trial is used.

The trial judge failed to specify what "other offenses" evidence he was referring to in the instruction. Subsection 3 refers to "two offenses", yet there were more than two offenses discussed in the course of the trial. The jury might properly have concluded that one of the offenses they should consider was evidence regarding McGuire's alleged assaults on his wife.

It is fallacious to argue that the items of evidence referred to in this instruction are, in fact, connected.

The first part, the impeachment of Daisy's testimony that she had no cause to be afraid of appellant, related not to Mark's treatment of the baby, but to his treatment of his wife (RT 463). Ms. Short's account of an incident of violence between husband and wife was disputed by other neighbors; however, the marital strife was linked, in the same instruction, to a statement in Part 3 that "it may logically be concluded that if the defendant committed other offenses, he also committed the crime charged in the case" (RT 756-757).

This permitted the jury to take evidence that appellant slapped his wife and pinched his baby's cheeks to determine that he murdered his child in the five to fifteen minutes it took his wife to walk to a phone booth and back on July 7, 1981 (RT 463, 466-468).

This instruction erroneously indicates that establishing the BCS itself makes a sufficient connection between the

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characteristic method is given use only the applicable inner bracketed purpose clauses . . ."] that the "clear connection" sentence was not intended to be given without the "characteristic method" sentence.

uncharged crimes and the crime charged. There is no authority for this connection.

The trial court's mangling of CALJIC No. 2.50 thwarted the purpose of those instructions by failing to limit the jury's consideration of evidence of uncharged crimes, and violated California law by permitting the jury to make a direct determination of guilt by concluding that McGuire committed other offenses.

B. The History of CALJIC 2.50 Shows The Impropriety of The Trial Court's Version

Although the trial court's erroneous instruction was drawn from part of the language contained in CALJIC and in California case law, the court's wording actually contradicted applicable law and was defeated the limiting purpose of the CALJIC instruction.

The Ninth Circuit, in reversing McGuire's conviction, found that the trial court's instruction told the jury to use the prejudicial evidence "in the most improper way possible," focusing particularly on subsection 3 (JA 110).

Under California law, evidence of an uncharged crime may not be considered by a jury, with some exceptions. *People v. Hill*, 67 Cal.2d 536, 551 (1967); *People v. Valentine*, 207 Cal.App.3d 697, 702 (1988). Exceptions include "similars" evidence, evidence to impeach credibility, and felony conviction of a crime affecting credibility of a testifying defendant. Such evidence is absolutely prohibited to prove the propensity of the defendant to commit crimes. *People v. Morgan*, 87 Cal.App.3d 59, 66 (1978). However, evidence of another crime may be considered if it is relevant to a disputed issue, for example, to prove the existence of a similar motive, scheme, plan, system, guilty knowledge, or intent. Cal. Evid. Code § 1101(b); FRE 404(b); *People v. Hill*, 67 Cal.2d, at 551; *People v. Valentine*, 207 Cal.App.3d at 702; *People v. McCullough*, 158 Cal.App.2d 310, 313 (1958). California law has long required that there be a "clear connection" between the un-

charged and the charged offenses in order for the stated exceptions to apply to a case. *People v. Lane*, 100 Cal. 379, 386 (1893); *People v. Lapin*, 138 Cal.App.2d 251, 258 (1956); *People v. Burke*, 18 Cal.App. 72, 98 (1912). However, no California authority has ever suggested that a jury be instructed that it may take a direct determination of guilt of the charged offense by concluding that the defendant committed an uncharged criminal act based on an unlimited "connection" to the charged offense which the unguided jury may happen to perceive. The trial court here so instructed this jury.

On the contrary, California law requires that a trial court, in reading CALJIC No. 2.50 pursuant to defense request, explicitly itemize for the jury what aspects of an uncharged crime may suggest such a "clear connection" to the charged offense, thereby strictly limiting the issues upon which such evidence is relevant and admissible. *People v. Nottingham*, 172 Cal.App.3d 484, 497 (1985); *People v. Swearington*, 71 Cal.App.3d 935, 949 (1977). The trial court must be precise if it instructs the jury as to the limitations on such evidence, because jurors are otherwise "unskilled and undisciplined in perceiving the limited purpose" for which such evidence may be considered. *People v. Williams*, 11 Cal.App.3d 970, 978 (1970); overruled on another point, *People v. Collie*, 30 Cal.3d 43 (1981); see *People v. Albertson*, 23 Cal.2d 550, 577-578 (1944). CALJIC No. 2.50 was written to serve that purpose.

In conformity with California law, the 1970 Revision of CALJIC No. 2.50 (Third Edition) was written to tell a jury that evidence "tending to show" that the defendant committed uncharged crimes could not be considered to prove that he had "a disposition to commit crimes," but rather could only be considered for the "limited purpose of determining if it tends to show" identity, motive, intent, knowledge, possession, or similar characteristic method, plan, or scheme. The CALJIC Use Note required a trial

judge to delete from the instruction any inapplicable purposes in the serial listing. The jury was to be instructed that it could not consider the evidence "for any other purpose."

Subsequently, the California Court of Appeal, in *People v. Haslouer*, 79 Cal.App.3d 818, 829, fn. 3 (1978), observed that the "common plan" part of CALJIC No. 2.50 "carrie[d] no disclosure of what use the jury may make of common plan once it determines there is one," and suggested that the CALJIC Committee redraft the instruction to explain further the use of such evidence. The suggested revision, adopted by the Committee in its 1979 Revision (Fourth Edition), was written to explain to the jury that, if evidence of uncharged crimes could be considered for the "limited purpose of determining if it tends to show" a similar "characteristic method, plan, or sheme," then the similar "characteristic method, plan, or scheme" could be considered if it further tends to show intent, corroboration of prosecution testimony, or "a clear connection between the other offense and the one of which defendant is accused so that it may be logically concluded that if defendant committed the other offense[s] he also committed the crime charged in this case." It is this "clear connection" language that the trial court in McGuire's case selected, wholly out of its indispensable context, thereby misinstructed his jury.

The Committee revised CALJIC No. 2.50 in 1984 in reaction to the California Supreme Court's opinion in *People v. Tassell*, 36 Cal.3d 77 (1984) and again revised the instruction in response to a 1986 legislative amendment to the California Evidence Code. Comment to CALJIC No. 2.50 (1987 Revision) (Fourth Edition, January 1987 Pocket Part); Note, California Evidence Code, section 1101. The Fifth Edition of CALJIC in 1988 also modified the instruction somewhat. None of the amendments to CALJIC No. 2.50 in any way validated the trial court's instruction to McGuire's jury. In fact, the "clear

connection" language was deleted altogether, apparently as an incidental effect of other alterations.

Thus, none of the various mutations of CALJIC No. 2.50, before or after 1982, would have permitted a trial court to instruct a jury, as the court did in this case, that it could make a direct determination of guilt of the charged offense from evidence that a defendant may have committed other offenses.

Had the trial court carefully utilized the language of CALJIC No. 2.50 and followed the recommendation in the Use Note to tailor the instruction to the relevant uses of the particular evidence, the court's instruction would have been in conformity with California law.[11] The trial court's failure to do so is inexplicable in light of the urging of the California Judicial Council in its Standards for Judicial Administration to use applicable CALJIC instructions, *id.*, at § 5, and the advice of appellate courts to consult the CALJIC Committee's Use Notes to determine whether an instruction requires editing in any given case. *People v. London*, 206 Cal.App.3d 896, 904 (1988); *People v. Haslouer*, 79 Cal.App.3d at 830.

The crazy-quilt, mix and match quality of the instruction left the jury with the mistaken impression that it could use the evidence of prior injuries to the baby, prior fights between the McGuires and force-feeding to prove murder.

Petitioner argues that the rough handling of Tori proved identity and intent (PB 35). The instruction given did not pinpoint the offense. The instruction tied all the evidence together, including the prior injuries,

[11] Respondent is not suggesting that the evidence was appropriately admitted or that a correct reading of CALJIC No. 2.50 would have cured the errors in this case. In fact, had the trial court correctly read and interpreted the law and the instructions, the evidence would not have been classified as "similar" or "other crime" evidence.

domestic disputes and carrying by one arm, and gave the "connecting" instruction without the tie to identity. There is no way that the rough feeding and carrying can be likened to the multiple, organ-smashing blows that killed Tori. The instruction proposed by the defense related directly to the evidence of prior injuries and complied with the actual admission of that evidence. The fractured ribs were not even considered by Dr. Hermann when he made his diagnosis.

C. The Trial Court's Instruction Violated Appellant's Right to Due Process By Removing From the Jury the Determination of Guilt Beyond a Reasonable Doubt

This Court has explicitly held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In spite of this requirement, petitioner and the Solicitor General argue that, when viewing the instructions as a whole, the instruction on reasonable doubt would somehow "cancel out" any error caused by the conceded conflict between the "clear connection" instruction and reasonable doubt instruction (PB 34-35; SG 26-27). The argument that "there is no reasonable likelihood that the jurors misunderstood the limits of the evidence or misapplied it," is preposterous in light of the misunderstandings, misapplications and misinterpretations which have taken place in the journey of this case to this Court (PB 35).

The Solicitor General argues as follows:

> That instruction states, in a general way, the principle that underlies much similar act evidence. If there is some clear connection between one act and another *evidence that a person committed the first act* may help prove he committed the second (SG 26).

Yes, that is a correct statement of the law. That is the precise error alleged by McGuire and found by the Ninth

Circuit. There was no evidence presented regarding the acts causing the rib and anal injuries to Tori. There was *no* connection between McGuire and those acts which could be used to establish a connection to the homicide charged herein. When compared to the other state and federal child abuse cases, it is *clear* that there is *no* such connection. The evidence did not establish that McGuire was a caregiver at the time those injuries were inflicted. In fact, there was no evidence regarding the time the prior injuries were inflicted. No evidence regarding the circumstances surrounding the prior injuries was received because, initially, they were received for the limited purpose of corroborating the finding of BCS.

By the time counsel for defendant determined that the facts were doing "double duty," not only in establishing BCS, but establishing McGuire's guilt by way of this catch-all instruction, the trial was over (JA 37).

This Court made clear the "constitutional stature" of the reasonable-doubt standard and emphasized its importance in the American scheme of criminal procedure as "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship, supra,* at p. 363.

This constitutional principle "prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of the crime." *Francis v. Franklin,* 471 U.S. 307 (1985). Convictions based on such presumptions must be overturned. *Sandstrom v. Montana,* 442 U.S. 510 (1979).

The trial court's instruction in this case usurped the duty of the trier of fact to determine guilt beyond a reasonable doubt. This presumption of guilt denied McGuire's right to due process of law. This unconstitutional reduction of the prosecution's burden of proof prejudiced McGuire, thereby necessitating reversal. The standard recently established by this Court for interpreting erro-

neous jury instructions is whether there is a reasonable likelihood that the jury applied this instruction in an unconstitutional way. *Boyde v. California,* —— U.S. ——, 110 S.Ct. 1190, 1198 (1990).

In effect, the trial court's instruction permitted the jury to do something it should not, something prohibited by settled constitutional principles. A reasonable juror could easily interpret the instruction as directing him to convict on very little evidence—evidence which does not meet the constitutionality mandated standard of proof beyond a reasonable doubt.[12]

D. The Unconstitutional Instruction Was Not Harmless Beyond A Reasonable Doubt

Most cases which have addressed the constitutionality of inferences and presumptions have analyzed prejudice pursuant to the *Chapman* standard requires that the error be found harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24; 87 S.Ct. 824, 828 (1967). The due process denial here cannot be deemed harmless beyond a reasonable doubt.

As the Ninth Circuit correctly stated, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts (JA 108). McGuire's prior acts vis-a-vis Tori attributed to him by Mrs. Short, but disputed by other neighbors, cannot by any stretch of the imagination be characterized as similar.

In order for those acts to be characterized as similar, the jury would have to make such a finding of a characteristic method, plan or scheme tending to show either the existence of the intent, identity or clear connection between the offenses.

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[12] "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana, supra,* 442 U.S. at p. 514.)

The application of this instruction to the prior injuries to the baby was improper without all the paragraphs and proper distinctions.

The BCS evidence of prior injuries was admitted to rebut any possible accident defense. It was not introduced for the purpose of showing a clear connection between the rib fractures and the murder in order to establish McGuire as the killer.

The jurors in this case were instructed on the general principles of reasonable doubt and the presumption of innocence (CALJIC No. 2.90). They were also told to view the instructions as a whole. (CALJIC No. 1.01). However, these general instructions "do not dissipate the error in the challenged portion of the instructions." *Francis v. Franklin, supra*, 471 U.S. at p. 320 (1965).

It was essential to McGuire's case that the jury be instructed accurately and completely on the use they could make of the other crimes evidence, particularly since McGuire was never tied to these other crimes. There was no instruction that adequately limited the use the jury could make of this evidence. The trial judge's instruction served the opposite purpose, allowing the evidence to be emphasized rather than limited.

Jury instructions convey essential legal principles to jurors otherwise unlearned in the law. "Jurors are not experts in legal principles; to function effectively, and justly, they must be *accurately* instructed in the law." *Carter v. Kentucky*, 450 U.S. 288, 302 (1981) (emphasis added).

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

This jury had bad guidance in an extremely troublesome area, it was prejudicial beyond a reasonable doubt.

CONCLUSION

The admission of character evidence for the purpose of establishing McGuire's propensity to commit crimes and the instruction herein so infected the trial that the conviction denied McGuire due process of law.

Uncharged misconduct cannot be linked to McGuire without proof—and a jury instruction cannot be used to establish that proof.

The jury instruction was an incorrect statement of the law which had the effect of shifting the burden of proof to a standard less than reasonable doubt. The error was of constitutional magnitude and was prejudicial. The Ninth Circuit correctly reversed the conviction. That decision should be affirmed.

Respectfully submitted,

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